

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MILO D. BURROUGHS,

Plaintiff,

v.

MARY E. PETERS, Secretary of Department
of Transportation,

Defendant.

CASE NO. C07-954RSM

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on defendant's motion for summary judgment. (Dkt. #6). Defendant argues that plaintiff's four claims must be dismissed because: (1) plaintiff has failed to establish a prima facie case of age discrimination; (2) plaintiff has no sexual discrimination claim because plaintiff has failed to exhaust his administrative remedies; (3) the Freedom of Information Act ("FOIA") does not contain a retaliation provision; and (4) plaintiff cannot assert a constitutional due process claim because there has been no waiver of sovereign immunity allowing plaintiff to maintain a separate constitutional tort action for money damages against the United States or one of its agencies.

Plaintiff responds that he has made the requisite showing to survive summary judgment because he was qualified for a job that he applied for. Plaintiff also maintains that he was denied minimum due process. Plaintiff does not address defendant's arguments in regarding the sexual

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discrimination claim and the FOIA retaliation claim.

For the reasons set forth below, the Court agrees with defendant, and therefore GRANTS defendant's motion for summary judgment.

II. DISCUSSION

A. Background

Plaintiff Milo D. Burroughs, appearing pro se, applied to four different Aerospace Engineering positions at the Federal Aviation Administration ("FAA") in early 2002. All four positions as an Aerospace Engineer required that the applicant "must have a bachelor's degree in engineering or its equivalent in education and experience, plus one year professional engineering experience in, or closely allied to, the field of the position described above." (Dkt. #10; Exhibit 1). Furthermore, the specific requirements of the positions plaintiff was applying for were controlled by the United States Office of Personnel Management's Operating Manual and Qualification Standards ("OPM's Operating Manual"). These requirements state:

Basic Requirements:

A. Degree: professional engineering. To be acceptable, the curriculum must: (1) be in a school of engineering with at least one curriculum accredited by the Accreditation Board for Engineering and Technology (ABET) as a professional engineering curriculum; or (2) include differential and integral calculus and courses (more advanced than first-year physics and chemistry) in five of the following seven areas of engineering science or physics: (a) statics, dynamics; (b) strength of materials (stress-strain relationships); (c) fluid mechanics, hydraulics; (d) thermodynamics; (e) electrical fields and circuits; (f) nature and properties of materials (relating particle and aggregate structure to properties); and (g) any other comparable area of fundamental engineering science or physics, such as optics, heat transfer, soil mechanics, or electronics.

OR

B. Combination of education and experience - college-level education, training, and/or technical experience that furnished (1) a thorough knowledge of the physical and mathematical sciences underlying professional engineering, and (2) a good understanding, both theoretical and practical, of the engineering sciences and techniques and their applications to one of the branches of engineering. The adequacy of such background must be demonstrated by one of the following:

1. *Professional registration* - Current registration as a professional engineer . . . Absent other means of qualifying under this standard, those applicants who achieved such registration by means other than written test (e.g., State grandfather or eminence provisions) are eligible only for positions that are within

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or closely related to the specialty field or their registration. For example, an applicant who attains registration through a State Board's eminence provision as a manufacturing engineer typically would be rated eligible only for manufacturing engineering positions.

2. *Written Test* - Evidence of having successfully passed the Engineer-in-Training (EIT) examination, or the written test required for profession registration . . .

3. *Specified academic courses* - Successful completion of at least 60 semester hours of courses in the physical, mathematical, and engineering sciences and in engineering that included the courses specified in the basic requirements . . .

4. *Related curriculum* - Successful completion of a curriculum leading to a bachelor's degree in engineering technology or in an appropriate professional field, e.g., physics, chemistry, architecture, computer science, mathematics, hydrology, or geology, and be accepted in lieu of a degree in engineering, provided that the applicant has had at least [one] year of professional engineering experience acquired under the professional engineering supervision and guidance. Ordinarily there should be either an establish plan of intensive training to develop professional engineering competence, or several years of prior professional engineering-type experience, e.g., in interdisciplinary positions. (The above examples of related curricula are not all-inclusive.)

(Dkt. #10; Exhibit 4 at pp. 1-2).

Consequently, in order to meet the minimum requirements, an applicant must either: (1) possess a degree in professional engineering pursuant to section A of OPM's Operating Manual; or (2) meet one of the four alternative requirements laid out in section B of OPM's Operating Manual.

Soon after plaintiff submitted his applications, Robyn Collyer, then a Program Management Specialist for the FAA, determined that plaintiff did not meet the minimum qualification standards.¹ Ms. Collyer indicated that plaintiff "did not have a 4-year college degree in engineering from an accredited university" and "did not qualify under alternate qualification methods." (Dkt. #7, Exhibit C at p. 2). However, plaintiff was adamant that he met the qualification requirements. Therefore Ms. Collyer asked a Human Resources Division

¹ Ms. Collyer was responsible for "receiving and reviewing each application and determining whether the applicant [met] the minimum qualifications and specialized experience requirements." (Dkt. #7, Exhibit C).

1 Staffing Specialist, two engineering managers, and a senior flight test engineer to review
2 plaintiff's application. Ms. Collyer indicated that all the "individuals independently arrived at
3 the conclusion that [plaintiff] was not qualified for the positions." (Dkt. #7, Exhibit D at p. 1).
4 As a result, Ms. Collyer sent plaintiff a letter on April 25, 2002, informing plaintiff that he was
5 not qualified.

6 Plaintiff subsequently requested a qualifications review of his application on June 7,
7 2002. Mariann Crane, manager of the Human Resources Division at the FAA, responded to
8 plaintiff on June 22, 2002. Ms. Crane stated in pertinent part:

9 Review of the application you submitted for the aforementioned vacancies show that
10 your B.S. degree from St. Martin's College in Aviation Operations and Maintenance
11 Management is not an engineering degree. There is no indication from either your
transcript or our communication with St. Martin's engineering school that this is a
professional engineering degree.

12 * * *

13 There is no evidence from your application that you have successfully passed the
14 Engineer in Training (EIT) or the written test required for professional registration
administered by a state board of engineering examiners.

15 * * *

16 There is no evidence from your application that you have obtained at least 60 semester
17 hours of physical, mathematical, and engineering sciences specified in the basic
18 requirements fully acceptable towards meeting the requirements of a professional
engineering curriculum.

(Dkt. #7, Exhibit E at p. 2).

19 Ms. Crane concluded that plaintiff did "not qualify for an Aerospace Engineer under
20 OPM guidelines." *Id.*

21 On October 11, 2002, plaintiff filed a complaint with the Equal Employment
22 Opportunity Commission ("EEOC"). Plaintiff alleged that he was discriminated against on the
23 basis of age, and requested a hearing before an Administrative Judge ("AJ"). On March 22,
24 2005, the AJ issued a decision without a hearing, holding that plaintiff "did not meet the
25 minimum qualifications required for the position" and that plaintiff "did not demonstrate that
26 there was any connection between his age and the Agency's actions." (Dkt. #7, Exhibit H at p.

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1 3). Further, the AJ stated that the FAA “has proffered legitimate, non-discriminatory reasons
2 for its actions[.]” and that plaintiff “failed to offer any evidence to suggest that the [FAA’s]
3 explanation for its action was only pretext for unlawful discrimination.” *Id.*

4 Plaintiff then appealed this decision to the EEOC’s Office of Federal Operations
5 (“OFO”) on March 9, 2007. The OFO affirmed the decision of the AJ, holding that “[w]e
6 concur with the AJ’s finding that [plaintiff] failed to establish a *prima facie* case of age
7 discrimination because he failed to show that he was qualified for the positions for which he
8 applied.” (Dkt. #7, Exhibit I at p. 3). Plaintiff then filed a motion for reconsideration of the
9 OFO’s decision on April 26, 2007. The OFO denied the motion, and held that plaintiff “has
10 adduced no evidence that would support a finding that he is qualified for the positions in
11 question. For that reason, the [original EEOC] decision . . . remains the Commission’s final
12 decision. There is no further right of administrative appeal[.]” (Dkt. #7, Exhibit J at p. 2).

13 Exhausting his administrative remedies, plaintiff filed the instant action in this Court on
14 June 18, 2007. Plaintiff’s complaint provides in pertinent part:

15 Plaintiff was subjected to age and sex discrimination, retaliation in the FOIA [Freedom
16 of Information Act] process, discriminatory animus in the examining phase involving
17 disparate treatment/impact and negative suitability determination. Failure of minimum
due process at the agency and EEOC while seeking employment at the Renton, WA
office of the FAA.

18 (Dkt. #1 at p. 2).

19 Plaintiff states four claims against defendant: (1) age discrimination; (2) sex
20 discrimination; (3) retaliation under the FOIA; and (4) denial of due process. Defendant now
21 moves the court for summary judgment to dismiss the four claims.

22 **B. Summary Judgment Standard**

23 Summary judgment is proper where “the pleadings, depositions, answers to
24 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
25 genuine issue as to any material fact and that the moving party is entitled to judgment as a
26 matter of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247

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(1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

Genuine factual issues are those for which the evidence is such that “a reasonable jury could return a verdict for the non-moving party.” *Anderson*, 477 U.S. at 248. Material facts are those which might affect the outcome of the suit under governing law. *See id.* In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *O'Melveny & Meyers*, 969 F.2d at 747). Furthermore, conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 60 F. 3d 337, 345 (9th Cir. 1995).

C. Plaintiff's Age Discrimination Claim

Federal workers over the age of forty are protected against discrimination in the workplace by the Age Discrimination in Employment Act (“ADEA”). *See* 29 U.S.C. § 633a. This act extends to “[a]ll personnel actions affecting employees or applicants for employment[.]” *Id.* Furthermore, in any employment discrimination claim, the plaintiff has the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981). A plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336,

1 97 S.Ct. 1843, 1854 (1977). In order to establish a prima facie case, a plaintiff must show: (1)
2 that he belongs to a protected class; (2) that he applied and was qualified for a job for which the
3 employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4)
4 that, after his rejection, the position remained open and the employer continued to seek
5 applicants from person's of complainant's qualifications. *See McDonnell Douglas Corp.*, 411
6 U.S. at 802; *Lindahl v. Air France*, 930 F. 2d 1434, 1437 (9th Cir. 1991); *Texas Dep't of*
7 *Community Affairs*, 450 U.S. at 253, n. 6.

8 In this case, plaintiff has failed to establish a prima facie case of age discrimination.
9 Although plaintiff is a member of a protected class under the ADEA, plaintiff was not qualified
10 for the job he applied for at the FAA. The OPM's Operating Manual is expressly clear when
11 indicating that in order to meet the *minimum qualification standards*, an applicant must either
12 possess a degree in professional engineering, or meet one of four alternative requirements.
13 Plaintiff clearly does not possess a degree in professional engineering, as his degree from St.
14 Martin's College is in Aviation Operations and Maintenance Management.² St. Martin's, after
15 being contacted by the FAA, confirmed that plaintiff's degree was not an engineering degree.
16 (Dkt. #7, Exhibit E at p. 2).

17 As a result, plaintiff must prove that he met one of the four alternative requirements set
18 forth by section B of OPM's Operating Manual. However, plaintiff cannot show that he
19 satisfies any of the alternative requirements. First, plaintiff did not possess registration as a
20 professional engineer. Second, plaintiff has not presented evidence of having successfully
21 passed the Engineer-in-Training examination, or a written test required for professional
22 registration. Third, plaintiff did not successfully complete at least 60 semester hours of course
23 in the physical, mathematical, and engineering sciences. The administrative record is clear, and
24 the plaintiff has conceded, that plaintiff has approximately 30 semester hours in these related

25
26 ² Plaintiff attended St. Martin's University (formerly known as St. Martin's College) from
27 1973-1974, and was awarded his degree on December 20, 1974.

1 areas. Lastly, plaintiff cannot satisfy the fourth alternative criteria because plaintiff does not
2 possess a related bachelor's degree in engineering technology or in an appropriate professional
3 field. Plaintiff acknowledges that he has "had an ongoing contentious dispute over [his]
4 credentials for several years," and that he "contacted Dr. Lazaro, Dean of [the] Engineering
5 College requesting to swap his Maintenance degree for a degree in Mechanical Engineering."
6 (Dkt. #10 at p. 6). Plaintiff concludes that the Dean "was unable to accommodate me because
7 SMC [St. Martin's College] *did not offer a Mechanical Engineering degree in 1974, at the*
8 *time I thought they did.*" *Id.* (emphasis added). Plaintiff therefore concedes that he does not
9 possess a degree related to engineering.

10 Consequently, plaintiff cannot survive the second prong of the *McDonnell Douglas* test.
11 The Court grants defendant's motion for summary judgment with respect to this claim.

12 **D. Plaintiff's Remaining Claims**

13 In his complaint, plaintiff also argues that he was discriminated against on the basis of
14 sex, that the FAA is guilty of retaliation, and that he was denied his minimum due process
15 rights. However, all of these claims are unwarranted for the following reasons.

16 First, plaintiff has failed to exhaust his administrative remedies in regards to his sexual
17 discrimination claim. In order for a complainant to maintain a suit of discrimination, "a claimant
18 must exhaust her administrative remedies by filing a claim of discrimination with the allegedly
19 offending agency in accordance with published procedures." *Leorna v. U.S. Dept. of State*, 105
20 F.3d 548, 550 (9th Cir. 1997). Here, it is clear that plaintiff has never alleged sexual
21 discrimination in any previous claim to the EEOC. Plaintiff has not exhausted his administrative
22 remedies. In any event, plaintiff has not addressed this argument in his response. Pursuant to
23 Local Rule 7(b)(2), "[i]f a party fails to file papers in opposition to a motion, such failure may
24 be considered by the court as an admission that the motion has merit." The Court finds that
25 plaintiff's failure to respond to defendant's opposition to his sexual discrimination claim is an
26 admission. Therefore this claim must be dismissed.

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1 Second, plaintiff does not have a retaliation claim for the very same reasons he does not
2 have an employment discrimination claim. "In a retaliation case, the burden shifting scheme is
3 much the same as that in an age discrimination case." *Nidds v. Schindler Elevator Corp.*, 113
4 F.3d 912, 919 (9th Cir. 1996) *quoting* *Lam v. University of Hawaii*, 40 F.3d 1551, 1559 & n.
5 11 (9th Cir. 1994). Since the Court has established that plaintiff has no employment
6 discrimination claim, he likewise has no colorable retaliation claim. In addition, plaintiff has
7 failed to address this claim in his response as well. This claim shall be dismissed.

8 Third, plaintiff's last claim for denial of due process lacks merit. Plaintiff claims he was
9 denied due process by the EEOC because the AJ issued his decision before the time allotted for
10 discovery had run. However, under the Administrative Procedures Act ("APA"), an agency
11 action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise
12 not in accordance with the law." 5 U.S.C. § 706(2)(A). Given the overwhelming evidence in
13 this case against plaintiff's claims of discrimination, the Court finds no justification to set aside
14 the AJ's findings. Plaintiff's claim for denial of due process is dismissed.

15 III. CONCLUSION

16 Having reviewed defendant's motion for summary judgment (Dkt. #6), plaintiff's
17 response (Dkt. #10), defendant's reply (Dkt. #11), plaintiff's surreply (Dkt. #12), the
18 declarations in support of those briefs and the exhibits attached thereto, and the remainder of
19 the record, the Court hereby ORDERS:

20 (1) Defendant's motion for summary judgment is GRANTED. Plaintiff's case is
21 DISMISSED WITH PREJUDICE.

22 (2) The Clerk shall forward a copy of this Order to the pro se plaintiff and all counsel of
23 record.

24 DATED this 28th day of September, 2007.



26 RICARDO S. MARTINEZ
27 UNITED STATES DISTRICT JUDGE

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